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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

JOHN D. RANDALL,

Petitioner,

vs.

W.W. REYNOLDSON; CLAY LeGRAND; WARREN J. REES; HARVEY UHLENHOPP; DAVID HARRIS; MARK McCORMICK; ROBERT G. ALLBEE; ARTHUR A. McGIVERIN; JERRY L. LARSON,

Respondents

IN THE MATTER OF SUSPENSION TO PRACTICE BEFORE THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF IOWA OF JOHN D. RANDALL

JOHN D. RANDALL,

Petitioner

IN THE MATTER OF SUSPENSION TO PRACTICE BEFORE THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF IOWA OF JOHN D. RANDALL

JOHN D. RANDALL

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) Can a lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by Fourteenth Amendment of the Constitution of the United States secure vindication of these constitutional rights in Federal Court under 42 USC, Section 1983? (2) Is the Iowa Code of Professional Responsibility as applied to this factual situation void for vagueness and indefiniteness in that it imports all Ethical Considerations into disciplinary grounds and does not afford fair and adequate notice of prohibited conduct which can be punished by disbarment?

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The Petitioner, John D. Randall, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, the orignial opinion having been entered on February 21, 1981, and rehearing having been denied on March 3, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A. hereto. Rehearing en banc was denied on March 3, 1981. The District Court opinion in U. S. District Court, Northern District, Cedar Rapids, Iowa, John D. Randall, Plaintiff, v. W. W. Reynoldson, et al, No. 80-13 (8th CCA No. 80-1451), is attached as Appendix B. The Order of the U. S. District Court, Northern District, Cedar Rapids, Iowa, on disbarment dated May 20, 1980, in Case No. Misc-80-6(8th CCA No. 80-1545), is attached as Appendix C. The

Order of the U.S. District Court, Southern District of Iowa, on disbarment dated January 17, 1980, in Case No. Misc-1-20(8th CCA No. 80-1254), is attached as Appendix D.

JURISDICTION

The Petitioner for Rehearing was denied by the Eighth Circuit on March 3, 1981. This Petition is filed within ninety(90) days of that date. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 19(1)(r) and 28 U.S.C., Section 1254(1). Jurisdiction in the Courts below was predicated on 43 USC, Section 1983, and 28 USC, Section 1343(3). In addition, the United States District Courts for the Southern District and Northern District of Iowa entered Orders barring Petitioner from practicing law in such Districts. Direct appeals of these Orders were taken to the Eighth Circuit.

QUESTIONS PRESENTED

(1) Can a lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by Fourteenth

Amendment of the Constitution of the United States secure vindication of these constitutiona rights in Federal Court under 42 USC, Section 1983?

(2) Is the Iowa Code of Professional Responsibility as applied to this factual situation void for vagueness and indefiniteness in that it imports all Ethical Considerations into disciplinary grounds and does not afford fair and adequate notice of prohibited conduct which can be punished by disbarment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution, Section 1:

"...(N) or shall any state deprive any person of life, liberty or property, wihtout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C., Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C., Section 1343:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by an person:...

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any rights privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

IOWA CODE OF PROFESSIONAL RESPONSIBILITY
(Appendix E)

STATEMENT OF THE CASE

John D. Randall, Petitioner herein, a practicing lawyer for many years and an ex-president of the American Bar Association, was disbarred by the Supreme Court of Iowa on November 14, 1979. See Committee on Professional Ethics v. Randall, 285 N.W. 2d 161 (Iowa 1979). Petition for Certiorari was denied by the United States Supreme Court on May 12, 1980. After the action by the Supreme Court of Iowa, the United

States District Court for the Southern District of Iowa entered an Order barring Randall from practicing law in the Southern District of Iowa and revoking his certificate to practice law in the Southern District of Iowa on January 17, 1980. The United States District Court for the Northern District of Iowa on May 20, 1980, entered a similar Order barring Randall from practicing law in that Court. The Orders simply accepted the conclusion of the Iowa Supreme Court without the consideration of the issue de novo by the District Courts. Petitioner appealed these Orders of disbarment directly to the Eighth Circuit Court of Appeals.

Meanwhile, on February 1, 1980, Petitioner filed a Petition for Declaratory Relief and to Compel Issuance of a License to Practice Law in the State of Iowa in the United States District Court for the Northern District of Iowa against each Iowa Supreme Court Judge. This action was brought under the provisions of 42 U.S.C., Section 1983, and 28 U.S.C.,

Section 1343(3). This action was dismissed, and Petitioner appealed this judgment to the Eighth Circuit Court of Appeals. At the Court of Appeals, the three cases were consolidated, and Petitioner was denied relief by the Eighth Circuit Court of Appeals. In addition to denying him such relief, the Eighth Circuit Court of Appeals also entered an Order of Disbarment.

It is the position of Petitioner herein that he has never had a fair hearing with due consideration given to his Constitutional rights by any judicial tribunal up to this point. The actions of the Iowa disciplinary agencies and the opinion of the Supreme Court of Iowa violated Petitioner's rights of due process both procedurally and substantively. Further, a regulation was applied retroactively which, if it does not amount to an ex post facto law, would at least amount to a violation of due process. Notwithstanding the violation of Petitioner's Constitutional rights in the State of Iowa, neither the Federal District

Court for the Northern District of Iowa or the Southern District of Iowa would allow Petitioner a hearing and an opportunity to show how his Constitutional rights had been violated. These actions were affirmed by the Eighth Circuit Court of Appeals, and Petitioner now seeks review at this level. Petitioner's rights of equal protection under the law were also violated by these disbarment orders of the State Court of Iowa.

THE FACTUAL BACKGROUND

Petitioner met Lovell Myers in the early 1940's and represented him in a 1943 divorce. In 1946, Petitioner and Myers became associated in a farming venture which lasted until Myers' death in 1976. Myers would manage the farming operations and Petitioner managed the financial affairs, tax work, and real estate transactions of the joint venture. Petitioner and Myers transferred all farm land to Myers Farms, Inc., in 1967. This corporation had been formed in 1952 and Petitioner and Myers each owned 50% of the stoc

Gilbert Morningstar was employed as a farm worker and foreman of the business from 1946 until 1974 and purchased eighty acres of farm property in 1956. The eighty acres was farmed by the corporation and there was dispute as to whether Morningstar had been acting as an agent of the corporation in purchasing the property or for himself. In 1973, Morningstar discovered that a warranty deed had been recorded to such eighty acres from himself and his wife to Myers Farms, Inc., and that a $90,000.00 mortgage had been placed on the property. Morningstar confronted the Petitioner and Myers and accused Myers of forgery of the warranty deed. Subsequently, Myers Farms, Inc., quitclaimed the property to Morningstar. Morningstar continued to work for Myers Farms, Inc. In 1974 he brought suit against Myers, the corporation, and Petitioner.

Myers asked Petitioner to prepare a Will leaving all of his property to Petitioner. The Will was prepared, signed, and witnessed.

At this time, Petitioner did not think he would outlive Myers, as Myers was seven years younger than Petitioner. The date of this Will was March 14, 1973. Petitioner continued to handle the Morningstar litigation which had been brought against Petitioner, Myers, and the corporation.

On February 18, 1976, Myers died, and Petitioner offered the Will for probate. Myers only child, Marie Jensen, brought suit to set aside the Will. As a part of such contest, she filed a complaint against Petitioner with the standing committee on professional ethics and conduct of the Iowa State Bar Association. The Morningstar suit and the Will contest resulted in the initiation of disciplinary proceedings which led to the revocation ofhis license to practice law.

By letter of September 28, 1977, the Committee on Professional Ethics and Conduct informed Petitioner of its determination to file a Complaint. Petitioner was not advised

of any Complaint other than that relating to the Myers Will and permitted the Ethics Counsel of the Committee to inspect files and photocopy records. The Committee filed a two-count Complaint with the first count alleging ethical violations involving the Myers Will and the second count alleging conflict of interest by Petitioner in the representation of Myers and Myers Farms, Inc. Petitioner denied the alleged ethical violations and by Motion of July 23, 1978, raised constitutional objections to the committee's retroactive application of amended ethical considerations and disciplinary rules relating to the Myers Will. He also objected to the Ethics Counsel visiting Petitioner's offices for the purported purpose of investigation of the Will matter when at that time, unknown to the Petitioner, the Complaint had been drawn in two counts and the Ethics Counsel was also acting as prosecutor to the alleged conflict of interest matter. On February 27, 1979, the Commission found Petitioner guilty and recommended dis-

barment.

Petitioner appealed to the Supreme Court of Iowa. On November 14, 1979, the Supreme Court of Iowa entered an opinion and order revoking Petitioner's license to practice law. The Court refused to consider Petitioner's due process arguments even thought the Petitioner had raised these constitutional objections by pleadings and oral submission before the Committee and the Supreme Court of Iowa. The Supreme Court of Iowa considered that the due process arguments had been waived.

Petitioner filed a suit under 42 U.S.C. 1983 to have a Federal Judge review the denial of due process rights and also raise the due process issue in the Federal Court action seeking his disbarment. These pleas were rejected and the Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. A lawyer who has been disbarred in a State Court proceeding violative of due process rights guaranteed by the Fourteenth Amendment of the Constitution of the United

States should be able to secure vindication of those constitutional rights in Federal Couet under 42 U.S.C., Section 1983.

The Appeal involves the legality and constitutionality of the action of the Greivance Commission of Iowa as well as an opinion by the Iowa Supreme Court which disbarred from the practice of law John D. Randall, who is now aged 81, a former president of the American Bar Association and a former chairman of the House of Delegates of the American Bar Association, and the founder and first chairman of the Section of General Practice of the American Bar Association. The members of the Grievance Commission seemed to manifest personal antipathy against Petitioner herein throughout his proceeding. He did not get a fair hearing and his constitutional rights of due process were violated in several particulars. He was treated differently than other lawyers and his Equal Protection Rights were violated. Further, and perhaps the most egregious error,

a standard of conduct promulgated in 1977 was used as a basis of disbarment for actions taken by Petitioner in 1973. Petitioner raised issues to cast doubt upon the fairness of the hearing and these issues were squarely before the Grievance Commission. However, the Supreme Court of Iowa giving a de novo review to the recommendation of disarment pursuant to its Rules, stated the following regarding the due process objections to Petitioner:

> "We think Randall's due process argument should have been submitted to the Commission, and certainly should have been included as a point in his brief in this submission. Because he failed to do either, we considered the due process argument waived." 285 N.W. 2d at 165. (Emphasis supplied)

It is submitted by the Petitioner herein that there should be a remedy available in Federal Court for one who has lost the valuable right to practice law through a hearing that has been violative of constitutional guarantees. The practice of law is not a matter of grace or privilege; it is a matter

of right for qualified individuals. See Baird v. Arizona, 401 U.S. 1, 8 (1971). Accordingly, the deprivation of this valuable property right without procedural due process should be a wrong that can be righted in Federal Court.

A precedent for an action such as the one involved herein under 42 U.S.C., Section 1983 is Peterson v. Shearan, 474 F. Supp. 1215 (July 25, 1979) which had been brought by a disbarred lawyer under similar circumstances. The District Judge in this case stated as follows:

> ". . . Although the case law overwhelmingly supports very limited Federal Court Review of State Court disciplinary proceedings, the Eighth Circuit, in a footnote in Goodrich v. Supreme Court of South Dakota, 511 F. 2d 316, 318, no date (Eighth Circuit 1975), indicated that a Federal Court is not entirely without jurisdiction to consider some claims arising out of a state disciplinary action proceeding:
>
> > '8. In Jones v. Hulse, . . . we declined to entertain an action alleging violation of 42 U.S.C., Section 1983 where the claims raised had been previously decided by the State Court on the ground the Federal Courts are without jurisdiction to review, in an Appellate capacity,

State Courts. It is clear from the cases cited in Jones, however, that where the federal action is brought under 42 U.S.C., Section 1983 the Federal Court does have jurisdiction to consider the constitutional claims not previously decided by the State Court. 28 U.S.C., Section 1343(3). (Citations omitted.)'

"(3) This Court reads the Goodrich footnote to mean that it has jurisdiction to review those constitutional claims not 'previously decided' by the State Court."

The Eighth Circuit Court of Appeals gave lip service to this principle, but did not engage in any meaningful review of the Constitutional violations claimed by Petitioner. This is exactly Petitioner's point as to why this Court should grant review so as to assure him a meaningful exercise of the due process rights. The Supreme Court of Iowa held that the constitutional arguments had been waived and formally entered the Order of Disbarment recommended by the Commission. The Federal District Courts refused to hold any sort of factual hearing in the case but contented themselves with accepting carte blanche the

Order of Disbarment by the Iowa Supreme Court. The Eighth Circuit Opinion appears to give little more solace on the fact of the matter to these claims, but the end result has been the same. That end result has been a lack of any review by any Appellate Court, State or Federal, of the actions taken by the Grievance Committee against Petitioner which resulted in his disbarment. He contends strongly in this Court that in combination 42 U.S.C., Section 1983 and 28 U.S.C., Section 1343 should allow Petitioner a meaningful forum for vindication of these due process rights. At the very least, the Federal District Court should have granted such a review and the Eighth Circuit Order affirming the failure to grant such a review is error. This Court should grant certiorari so as to make the remedy under 42 U.S.C., Section 1983, for violation of Constitutional rights in a state disbarment proceeding an effective one.

There should be a remedy available to

Petitioner in the Courts of the United States. Petitioner refers this Supreme Court to one analogous case which fashioned a remedy where none appeared to exist at first glance.

> Sotomura v County of Hawaii (USDC Hawaii, 1975), 102 F. Supp. 95.

See also Getty v. Reed (US 6th CCA, 1977), 547 F.2d 971.

In Sotomura, the Court said at page 103:

> "***In this action, there is no issue of state law which requires further resolution by the state courts. The Hawaii Supreme Court made an unequivocal ruling on the relocation of plaintiff's property; this very ruling is alleged to have violated plaintiff's constitutional rights. At present, plaintiffs have no other remedies in the state court system.***"

Petitioner is confronted with the same dilemma in the petition to declare that the state court's order of disbarment violated his rights of due process and equal protection under the law.

2. The Iowa Code of Professional Responsibility as applied to Petitioner's factual situation is void for vagueness and indefiniteness in that it imports all ethical

considerations into disciplinary grounds and does not afford fair and adequate notice of prohibitive conduct which can be punished by disbarment

Petitioner has suffered the ultimate sanction of disbarment because of conduct committed in 1973 that was condemned in light of 1977 standards. At the time Petitioner herein committed the action charged against him, he could not have reasonably been held to have been placed on notice that he was doing anything wrong. Yet, the Grievance Commission treated Petitioner herein differently than other similarly situated thus violating his Equal Protection Rights and applied 1977 standards to 1973 conduct which is a grievous violation of due process rights.

The Iowa Code of Professional Responsibility draws a distinction between Ethical Considerations and Disciplinary Rules. Petitioner herein has consistently objected to the inclusion in the Complaint of

violations of ethical considerations in 1973 as the basis for disciplinary proceedings. The conduct for which Petitioner was disbarred was not a disciplinary offense at the time it occurred.

The Code has continually provided that the "Ethical Considerations are aspirational in character . . . the Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action". When Petitioner committed the action complained of, there was no disciplinary rule of any fashion against doing the action taken by Petitioner. On the contrary, the Iowa Code of Professional Responsibility for lawyers did have an Ethical Consideration touching same providing as follows:

> EC5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible

> to the charge that he unduly influenced or overreached a client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.
>
> EC5-6. A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of imporpriety.

Thus, at the time Petitioner drafted the Will, there was no Disciplinary Rule against doing this whatsoever. The record reveals that he did have an associate in his office consult with Myers independently in private before the Will was signed. Given the unique relationship between Randall and Myers stretching back into the 1940's and the circumstances of the execution of this instrument, it is impossible to conclude that Petitioner knew,

or could reasonably have known, that he was engaging in con : that could subject himself to disbarment in 1973.

However, the Iowa Supreme Court changed the rules in midstream when on December 16, 1977, the following Disciplinary Rule was promulgated:

> DR5-101. Refusing employment when the interest may impair his independent professional judgment. (b) A lawyer or the lawyer's partners or associates shall not prepare any instrument in which a client desires to name the lawyer beneficiary unless the laywer is the spouse of, son-in-law, or daugher-in-law, or is otherwise related by consanguinity or affinity within the third degree to the client.

Then, in Committee on Professional Ethics v. Behnke, 276 N.W. 2d 838 (Iowa 1979) the Iowa Supreme Court held that the lawyer violated EC5-5 by drafting a Will for a client in which he was named as a contingent beneficiary and suspended him indefinitely. Behnke was then used in the present case as the basis for a statement of the Iowa Supreme Court to the effect that a violation of EC5-5 would be unethical conduct. This is legal boot-

strapping of the highest order.

Disbarment is a quasi-criminal proceeding. In 1973, it was unforseeable that in 1977 the Iowa Judiciary would make the ethical considerations a penal provision of the Code. However, the 1977 enlargement of the penal provisions and the 1979 Behnke case was applied retroactively to Petitioner's conduct in 1973. This operates precisely in the manner of an ex post facto law such as Article I, Section 10, of the Constitution forbids. See Bouie v. Columbia, 378 U.S. 347, 352-3 (1964). The Eighth Circuit distinguishes this ex post facto character by saying this is not a criminal case but certainly the utilization of the 1977 standard to make disbarrable 1973 conduct operates to deprive Petitioner of notice that certain conduct would result in disbarment proceedings and therefore violated Petitioner's due process rights under the Fourteenth Amendment.

Petitioner refers this Court to an excellent article in 65 Iowa Law Review 1386:

"Note--Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions."

In two cases cited by the author of the Note, Russell W. Damtoft, the Courts held Disciplinary Rule 7-107 unconstitutional on account of vagueness:

(1) Hirschkop v. Snead, 594 F. 2d 356, 371 (4th CCA, 1979). The Court cited Baggett v. Bullitt, 377 US 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed 2d 377, _____ (1964).

(2) Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 253 (7th CCA, 1974), cert. denied, 427 US 912 (1976).

The Chicago Council of Lawyers sued for a Declaratory Judgment and injunction against enforcement of local criminal rules and of a Disciplinary Rule sought to prohibit extra-judicial comments by attorneys in criminal and civil cases. The District Court granted a motion to dismiss. The Court of Appeals reversed and remanded the case.

Petitioner reminds this Court how unwieldy it would be for all 138 Ethical

Considerations of the present Iowa Code, modelled after the ABA Ed Wright Code, to be held of equal value in compelling compliance by lawyers and disbarring lawyers who violated any of the 138 Ethical Considerations just as for violating Disciplinary Rules.

> "Several jurisdictions have explicitely rejected the use of Ethical Considerations for disciplinary purposes. These are Indiana, Missouri, Wisconsin and arguably New York***" Damtoft, 65 Iowa Law Review 1387, Footnote 12.

Damtoft in Footnote 23, page 1389, says the Iowa Court had adopted ethical considerations as a basis for attorney discpline and cited three decisions besides Randall. It is time for this Supreme Court to take the challange and examine the Iowa Code of Professional Conduct as administered to Iowa lawyers and to hold that as such it is unconstitutional for violating rights of due process and equal protection under the law. The highest Court in these United States must act to prevent the Iowa Supreme Court from inflicting upon its lawyers including Petitioner Randall such

terrible un-American punishments and judicial edicts all reeking with gross injustice to the lawyers of Iowa.

See Connally v. General Construction Company, 269 US 385, 70 L.Ed 322, ____S. Ct. _____(1926) and the note appended at page 322.

Petitioner decries this lack of notice in the strongest terms. Changing the rules of the game in midstream is exactly the type of conduct that the due process clause should protect against. The use of the 1977 Amendment to criminalize the 1973 conduct so as to justify disbarment is deplorable. It is a violation of the due process rights of this Petitioner in the highest fashion. The Court should grant certiorari to right this due process wrong.

CONCLUSION

There were serious due process defects in the manner and method by which Petitioner lost his license to practice law. This has resulted in a deplorable end to a distinguished legal career. There should be a federal

corrective remedy for state violations of constitutional rights and 42 U.S.C., Section 1983 is that remedy. Likewise, the flagrant due process violation of using a 1977 standard to evaluate 1973 conduct is a violation of constitutional rights. This Court should grant certiorari so as to allow Petitioner a remedy for these violation.

Respectfully submitted,

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Petitioner

A

OPINION OF THE EIGHTH CIRCUIT

GIBSON, Senior Circuit Judge.

This consolidated appeal concerns four separate proceedings involving the disbarment of John D. Randall, Sr., herein after referred to as Randall, from the practice of law. On November 14, 1979, the Supreme Court of Iowa disbarred Randall for drawing a will for a business partner, in which Randall named himself as sole beneficiary, and for engaging in a conflict of interest by representing a corporation, wholly owned on an equal basis by Randall and his business partner, in litigation with a former employee. Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Randall, 285 N.W.2d 161 (Iowa Sup. Ct. 1979), cert. denied, _____U.S._____, 64 L.Ed.2d 802(1980).[1]

[1]Randall challenged the Iowa disbarment proceedings by filing a 42 U.S.C. § 1983(1976) remedy action in the united States District Court for the Northern District of Iowa against each of the justices of the Supreme Court of Iowa, alleging a denial of due process and equal protection. The District Court dismissed the action on May 20, 1980, finding it to be essentially a collateral attack on the decision of the Supreme Court of Iowa. Randall appeals this decision in Appeal No. 80-1451.

Randall's disbarment in Iowa resulted from his actions, found to be a conflict of interest in connection with drawing a will for Lovell Myers and also from Randall's representation of Myers's corporate interest. The complete findings of the Supreme Court of Iowa with regard to these matters are reported in Randall, supra, 285 N.W.2d 161-65. We present below only a short summary of these findings.

In the early 1940's Randall met Myers and entered into a joint venture for the purpose of purchasing and farming farmland in Iowa. Myers managed the day-to-day farming activities, while Randall handled the financial affairs. In 1952, Myers and Randall incorporated the farming operation, under the corporate name of Myers Farms, Inc., each receiving fifty percent of the stock.

Myers was divorced from his wife in the early 1940's. Myers did have a child, now Mrs. Marie Jensen, by way of the marriage. In 1949, she married and has had two sons. Myers was relatively close to his daughter and grandsons

prior to his death in 1976. Randall contended this was not so, but the Supreme Court of Iowa found to the contrary.

The farming venture prospered under the ownership of Myers and Randall. In 1973, however, the farm foreman, Gilbert Morningstar, accused Myers of forging a deed to an eighty-acre tract of land which Morningstar acquired by warranty deed in 1956 from Charlie Hess. This deed was recorded on February 29, 1956. In 1967, a deed, admittedly forged by Myers, was signed, conveying the eighty acres from the Morningstars to Myers Farms, Inc. This forged deed was notarized by an associate in Randall's office. Later the corporation executed a $90,000.00 mortgage on this eighty acres, which mortgage also included other land belonging to the corporation. At the time Morningstar confronted Myers and Randall with the forged deed, Randall, at Myers's urging, prepared and executed a quit-claim deed to the land from the corporation to the Morningstars. Myers assured Morningstar that the mortgage

would be released from this eighty-acre propert
When the release was not forthcoming after abou
a year, Morningstar resigned from his employmen
and sued the corporation, Myers, and Randall to
remove the mortgage and for damages. Randall
represented himself and the corporation in
the action surrounding the title to the land.
See Morningstar v. Myers, 225 N.W.2d 159(Iowa
1977). In that action, which was dismissed
on January 17, 1979, by the parties, Randall
claimed title to the land under a copy of an
unrecorded deed antedating by a day the
original, recorded deed to Morningstar. This
alleged deed from the Morningstars was never
filed of record and has never been produced,
although a copy of it was produced by Randall
in defense of the Morningstar suit. We note,
however, that the corporation did not claim
title under the purported unrecorded deed
when it obtained a mortgage on the land in 1967

Approximately one month after Morningstar
accued Myers, in Feburary 1973, of forging
the land deed, Myers executed a will. The

will was drawn by Randall and named Randall sole executor and sole beneficiary of Myers's estate, valued at over two million dollars. Randall placed the will in his private desk drawer, did not keep a copy in the office file, and apparently did not give a copy to Myers.

In early 1976, Myers died. A few days later, Randall asked Mr. Jensen whether she knew of any will made by Myers, her father. She replied in the negative and inquired of Randall whether he knew of any. He said he did not. Less than a week later, Randall filed Myers's will in the probate court. Randall explained his denying knowledge of a will to Mrs. Jensen as a lapse of memory.

Mrs. Jensen subsequently filed a suit contesting the will. Radall settled the suit for approximately one and one-half million dollars. Prior to settlement, Mrs. Jensen filed a complaint against Randall with the Iowa Bar, which ultimately resulted in Randall's disbarment by the Supreme Court of Iowa.

Following the state disbarment, on January 17, and May 20, 1980, respectively, the United States District Courts for the Southern and Northern Districts of Iowa disbarred Randall from practice in their courts on the basis of the Supreme Court of Iowa's action in the disbarment proceedings. Randall appeals these decisions in Appeals No. 80-1254 and 80-1545 respectively. On July 10, 1980, this court entered an order for Randall to show cause why he should not be suspended or disbarred by the Eighth Circuit. This original proceeding is No. 80-8117, wherein Randall contends he should not be disbarred from this court.

We affirm the decisions of the District Courts in disbarring Randall and in dismissing his 1983 action against the justices of the Supreme Court of Iowa, and we disbar Randall from the practice of law in the United States Court of Appeals for the Eighth Circuit.

I.

The licensing of attorneys is primarily

a state function, usually under the aegis and direction of the various states' highest courts. The federal courts, except in limited circumstatnces, recognize and give effect to the findings of disciplinary proceedings in the state courts.

The Iowa Supreme Court in a unanimous decision, with one justice not participating, held Randall to be in violation of the Iowa Code of Professional Responsibility and revoked his license. The United States Courts of Appeals are without jurisdiction to review a state judgment of disbarment. Jones v. Hulse, 391 F.2d 198, 202 (8th Cir.), cert. denied, 393 U.S. 899 (1968); e.g., Sawyer v. Overton, 595 F.2d 525 (5th Cir. 1979); Rivera v. Mange, 587 F.2d 529 (1st Cir. 1979). The only appeal from the Iowa court is by way of certiorari to the United States Supreme Court. See Konigsbert v. California, 353 U.S. 252, 258 (1957) (limited review of state admission proceeding by Supreme Court on review by writ of certiorari); In re Summers, 325 U.S.

561, 568-69 (1945) (same).

With regard to Randall's potential disbarment from this court, however, we have jurisdiction to review the findings of the Supreme Court of Iowa. Still, this court must give high respect to the judgment of the state court in its disbarment proceedings. "But it is not conclusively binding on the federal courts." Theard v. United States, 354 U.S. 278 (1957). See In Re Ruffalo, 390 U.S. 544, 547 (1968); Jones v. Hulse, supra, 391 F.2d at 200-01. "Disbarment by federal courts does not automatically flow from disbarment by state courts." Theard, supra, 354 U.S. at 292. The extent of the responsibility of a federal court to make an independent, de novo review was outlined by the Supreme Court in Selling v. Radford, 243 U.S. 46, 50-51 (1916), wherein the Court stated:

> That is to say, we are of opinion that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was

> notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

II.

Since the crux of these regrettable proceedings rests primarily on the disbarment judgment of the Supreme Court of Iowa, we first consider the collateral attack, by way of the section 1983 complaint, on that

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judgment. The section 1983 injunctive remedy action was filed against the justices, individually, of the Supreme Court of Iowa. In his complaint, Randall charged that the justices deprived him of equal protection and due process in violation of the fourteenth amendment. Randall alleged (1) that he was denied discovery; (2) that he was tried by a

biased panel of the Grievance Commission; and (3) that generally there were insufficient facts in the record to support his disbarment. Randall also alleges certain improprieties by chief counsel for the Ethics Committee, Gaudineer, and by the Grievance Commission.

Randall, by filing his section 1983 remedy against the justices of the Supreme Court of Iowa, has attempted to obtain collateral review of the findings of that court. This court has taken the position that res judicata applies to issues previously litigated in the state disciplinary procedures. Goodrich v. Supreme Court of the State of South Dakota, 511 F.2d 316, 318 (8th Cir. 1975). We held in Goodrich, however, that only those issues which were actually litigated would be subject to res judicata, or more precisely, collateral estoppel. Id. We therefore will not review the factual basis of Randall's Iowa state disbarment, except to the extent that we find the acts alleged were of a nature as to form a proper predicate for disbarment

procedures. See Allen v. McCurry, ____, ____, 49 U.S.L.W. 4015, 4019 (Dec. 9, 1980).

Randall's allegations regarding lack of due process in the disciplinary procedure were not ruled upon by the Supreme Court of Iowa. That court held that since Randall did not present the issue before the Grievance Commission or in his brief to the court he could not raise it for the first time at oral argument, and then concluded that the due process argument must be considered waived. Randall, supra, 285 N.W.2d at 164-65. This constitutional issue is properly before us for review. C.f. Allen v. McCurry, supra, _____ U.S. at _____, 49 U.S.L.W. at 4017 n. 5 (reserving judgment).

Randall claims that the denial of his discovery against the justices of the Iowa Supreme Court, and earlier, against the Grievance Commission members, was a denial of due process. We have reviewed the record and find that the interrogatories presented to those individuals were an attempt to

obtain the mental impressions of the Commission and of the court in the decisionmaking process. The Iowa disciplinary proceedings constituted an inquiry into Randall's professional conduct. Randall attempted to counter by trying the Commission and the Iowa Supreme Court. These tactics are impermissible, contrary to an orderly system of justice, and present no justiciable issue in limiting discovery into the internal operations of the Commission and the Supreme Court of Iowa. See Hickman v. Taylor, 329 U.S. 495, 510-11 (1947): c.f. Dennis v. Sparks, _____U.S. _____, _____, 49 U.S.L.W. 4001, 4003 (Nov. 17, 1980) (Court "unaware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding." (Footnote omitted.)) This would not extend to the functioning of the judicial process, as it is recognized to be "in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of

a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corpution." (Citations omitted.) Id. Both the Supreme Court of Iowa and the United States District Court for the Northern District of Iowa properly limited discovery in this area.

We next review Randall's allegation of bias on the part of the Grievance Commission. Randall was allowed to raise this allegation in an interlocutory proceeding before the Supreme Court of Iowa. The court denied the challenge with the reservation that it could be raised in the de novo disbarment hearing before the court after the Grievance Commission had made its recommendation. Randall did not subsequently raise this issue before that court. While we believe that this allegation is probably barred by the doctrine of res judicata as outlined in Goodrich, supra, 511 F.2d at 318, we find that the Commission was

not baised against Randall, be either "pre-judgment of the facts or personal interest." Gibson v. Berryhill, 411 U.S. 564, 578(1973). Furthermore, the District Court also examined the merits of Randall's claim and could "find no violation of any constitutional rights." This court should give deference to the District Court's findings on this matter. Id. at 579.

The members of the Grievance Commission individually asked a number of questions of the witnesses. Randall complains of the members' activity in this regard and alleges that it demonstrates a bias against him. We think, to the contrary, that it demonstrates the Commission's interest in actually trying to ascertain the true facts of this somewhat complex interplay of human emotions and personal interests covering an adult lifetime of activity. The testimony elicited still leaves unanswered some pertinent questions, i.e., how the forged deed from Morningstar to Myers and Randall was notarized in 1967; what

happened to the original warranty deed in 1956 from Morningstar to Myers and Randall antedating by one day the conveyance to Morningstar and which Randall is claiming gives him title to the land; and, further, why was the that deed not filed of record? It appears, however, that the Grievance Commission adopted a very neutral stance in not allowing the initial complaint to be amended by the complaintant or ordering the amendment itself. The Commission was patient with Randall and all the witnesses, allowing the witnesses and counsel all the time needed to present the testimony offered. The Grievance Commission even adjourned in the midst of its hearing to allow Randall to take an interlocutory appeal to the Iowa Supreme Court, alleging the bias of the Commission. We view the Commission as having objectively undertaken a not-too-pleasant task, and as having conscientiously considered the charges and the defense presented. Randall's due process rights were fully repsected by the Commission.

Finally, we again note that Randall was given due notice and a plenary hearing before both the Grievance Commission and the Supreme Court of Iowa.[2] There were sufficient factual matters in the record concerning Randall's conduct to form a proper predicate for the sanctions imposed.

We also find no violation of Randall's equal protection rights concerning the disbarment proceedings. Randall also contends that he is being singled out for treatment because of his prominent position as one of the leading attorneys of the State of Iowa, and as a past president and other high official of the American Bar Association. We find this contention lacks merit. Suffice it to say that other prominent Iowa lawyers have been disciplined. The State Bar in Iowa has disciplined, although not disbarred, a former

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[2]In our review of Randall's allegations of impropriety concerning the Ethics Committee and the Grievance Commission, we have been unable to find any actions that can be raised to the level of a constitutional violation.

United States Congressman, a former president of the Young Lawyers Section of the Iowa State Bar Association, and a professor at the University of Iowa School of Law.

Randall also alleges unequal treatment in the punishment of disbarment imposed on him. While we do not feel it is incumbent upon the Ethics Committee counselor, Gaudineer, to show equality of treatment, as there are so many various factors involved in each bar disciplinary porceeding that the court must be given considerable leeway in meting out the sanctions imposed, we do feel that a defense of this type should be viewed as an affirmative one which falls upon the lawyer charged with the misconduct; from the record here, there is a total lack of evidence indicating that Randall has been singled out for punitive treatment. In addition, each disbarment proceeding must stand on its own factual situation. Here, though the sanction imposed was severe, it was within the permissible range under the law. We are not in a

position, nor authorized, to second-guess the highest state court on the sactions it imposes.

III.

We next address the matter of the potential suspension or disbarment of Randall from this Court. Randall was issued a show cause order on July 10, 1980, concerning why he should not be disbarred from this court. See Federal Rule of Appellate Procedure 46(b); Theard v. United States, 354 U.S. 278, 282 (1957). Randall responded principally by challenging the factual basis of the Supreme Court of Iowa's opinion in his disbarment from that court. See Randall, supra, 285 N.W.2d at 161-64.

The limited standard of review of the factural findings of the Supreme Court of Iowa involving Randall was outlined in Selling v. Radford, supra, 243 U.S. at 46; ante at _____. Accordingly, we have reviewed the entire record of the state disbarment proceedings, including reading the voluminous

transcript of Randall's hearing before the Grievance Commission and the appendix filed in the Supreme Court of Iowa case. The evidence produced, based in large part upon Randall's uncontroverted testimony, established that Randall, on March 14, 1973, drew a will for Lovell Myers, his business partner for over twenty-five years, in which Myers left his entire estate, conservatively valued at over two million dollars, to Randall. We agree with the Supreme Court of Iowa that this action violated Ethical Canon 5-5 of the Iowa Code of Professional Responsibility for Lawyers, as in effect in 1973, which provided:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another

lawyer selected by the client. (Emphasis added.)

The Supreme Court of Iowa found the "exceptional circumstances" clause did not apply in Randall's case. Randall, supra, 285 N.W.2d at 165. On appeal, Randall makes the same argument in favor of its application as he did in the Iowa proceedings. Randall contends that the long years of his business partnership with Lovell Myers should allow him to draw a will leaving him the entire estate.

We disagree. First, the amount of property involved, plus the fact that Myers had a living daughter and two grandsons, put Randall on notice that other parties might have a significant interest in pursuing a will contest if Randall were to draw a will naming himself as beneficiary. Second, circumstances surrounding the drawing of the will, namely the controversy concerning the land deed involving Lovell Myers and an employee, foreman Gilbert Morningstar, should

have alerted Randall to the charges of over-reaching or undue influence which might arise if he were to draw the will. Randall erred and erred grievously.

Randall next argues that even if he violated Ethical Canon 5-5 he should not be disbarred for a merely ethical, as opposed to disciplinary, violation. The Supreme Court of Iowa, in Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838, 840 (Iowa Sup. Ct.), appeal dismissed, 444 U.S. 805 (1979), held that "violation of an ethical consideration, standing alone, will support disciplinary action." Randall contends that holding violates both due process and the ex post facto clause.

Randall's contention that violations of ehtical canons could not lead to professional discipline, as that would be violative of due process, is not well taken. Ethical considerations are more than aspirational

and are mandatory.[3] The Supreme Court of Iowa, in Matter of Frerichs, 238 N.W.2d 764, 769, specifically held:

> All lawyers practicing before this court are bound by the cannons and the provisions of the Iowa Code above set out. They are not free to view them merely as aspirational. A canon cannot be ignored by an attorney upon the claim he believes it conflicts with his view of a constitutionally protected right.

Furthermore, it appears that the prohibition contained in EC 5-5, prohibiting the drafting of a will be an attorney making himself a beneficiary, is but the current articulation of a long-standing porhibition against that practice. Obviously such a situation is fraught with a high potential for overreaching and abuse. The prohibition in EC 5-5 is also only a restatement of old old Canon 9,

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[3]We are not holding that every violation of an ethical consideration would be grounds for disciplinary action, but are holding that the violation herein involved, being significant and substantial, and having been found by the Iowa Supreme Court to be a basis for disciplinary proceedings, is also thought by us to constitute an appropriate basis for action.

Canons of the American Bar Association. In Re Krotenberg, 111 Ariz. 251, 527 P. 2d 510, (1974); Columbus Bar Association v. Ramey, 32 Ohio St.2d 91, 290 N.E.2d 831 (1972); In Re Jones, 254 Or. 617, 462 P.2d 680 (1969); In Re Kneeland, 233 Or. 241, 377 P.2d 861 (1963); In Re MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960); In Re Moore, 218 Or. 403, 345 P.2d 411 (1959); Lantz vs State Bar of California, 212 Cal. 213, 298 P. 497 (1931).

Randall also contends that application of EC 5-5 to his situation constituted an ex post facto enforcement of that prohibition. The ex post factor contention falls for two reasons: (1) The ex post facto clause and concept is anly applicable in criminal cases. See Galvan v. Press, 347 U.S. 522, 531 n.4 (1954); Nicholson v. Judicial Retirement and Removal Commission, 562 S.W.2d 306, 308 (Ky. 1978). And (2) there is no true ex post fact situation here presented, as a prohibition both in the old canons of professional

responsibility and in the new codes have condemned the practice herein charged.

The Supreme Court of Iowa also found that Randall's representation of both his own and Myers's corporate interests in the Morningstar land title suit was a conflict of interest in violation of Iowa's Disciplinary Rules 5-101(A) and 5-104(A).[4] The Court based this finding on Randall's suspicions concerning the forged deed involving Myers and Morningstar. We agree with the Supreme Court

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[4]Iowa Disciplinary Rule 5-101(A) provides:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

Disciplinary Rule 5-104(A) provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

of Iowa that, in these circumstances, Randall was under a duty to withdraw from representation of Myers's fifty percent interest in the corporation.

We therefore find that Randall's actions with regard to the will and the representation of Myers's corporate interest warrant disbarment from this court.

IV.

Finally, we turn to Randall's disbarment from the United States District Courts for the Northern and Southern Districts of Iowa. Both courts independently reviewed the proceedings before the Supreme Court of Iowa in accordance with the dictates of Selling v. Radford, supra, 243 U.S. at 50-51, and found sufficient bases for disbarment in their courts. Given our disposition of Randall's disciplinary procedure before this court, ante at 16, the District Courts did not err in disbarring Randall.

John D. Randall, Sr. is ordered disbarred from this court.

The decision of the Districts Courts are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

B

ORDER DISMISSING REYNOLDSON CASE IN THE NORTHERN DISTRICT OF IOWA.

This matter is before the court on defendants' resisted, amended and substituted motion to dismiss filed March 25, 1980.[1] Dismissed.

Plaintiff John D. Randall was charged by the Grievance Committee of the Iowa State Bar Association in a two-count complaint with unprofessional conduct arising from his acting as both draftsman and sole beneficiary of a client's will and representing a client

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[1]On February 22, 1980, defendants also filed a motion to dismiss with brief. However, defendants' second motion apparently was intended to incorporate and supersede that motion and both motions will be considered together.

in litigation in which there was a conflict between the client's and Randall's interests. After hearing and recommendation by the Commission, Randall was disbarred by the Iowa Supreme Court. Committee on Professional Ethics v. Randall, 285 NW2d 161 (Iowa 1979) cert. denied _____USLW _____(1980).

Randall then filed this action, apparently against the individual justices of the Iowa Supreme Court seeking to have this court determine that the Supreme Court of Iowa violated his rights to due process and equal protection and that he has a right to have the opinion set aside and his license to practice restored.

Defendants have moved to dismiss on the following grounds:

> (1) That 42 USC §1983 does not confer subject matter jurisdiction upon this court to review the merits of a final judgment of a state supreme court disciplining a member of the courts' bar for professional misconduct.
>
> (2) That the action is barred by the claim preclusion branch of the doctrine of res judicata.

(3) That the court should decline jurisdiction on grounds of comity.

(4) Plaintiff has failed to state a claim against the individual justices.

(5) The court lacks personal jurisdiction over several of the defendants because proper service has not been made.

(6) Plaintiff has failed to state a claim for relief.

Plaintiff has resisted the motion in each particular. While the court agrees with defendants' position with respect to all grounds except #3, it feels that only #1 and #2 warrant discussion here.

It is clear that a lower federal court is wholly without jurisdiction to review, in an appellate capacity, the merits of a state disciplinary proceeding. See Martinez Rivera v. Trias Monge, 587 F.2d 539 (1st Cir. 1978); Grossgold v. Supreme Court of Illinois, 557 F.2d 122 (7th Cir. 1977); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969); Jones v. Hulse, 391 F.2d 198 (5th Cir. 1968). It is the United States Supreme Court which has

exclusive jurisdiction to review final judgment of a state court under 28 USC §1257 and even this review is limited to narrow constitutional issues. See Theard v. United States, 354 U.S. 278 (1956; Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Donigsberg v. State Bar of California, 353 U.S. 252 (1957).

Further, the Eighth Circuit has held that the principle of res judicata applies to Section 1983 actions and operates as a bar to the relitigation of constitutional issues actually raised, as well as to constitutional issues that could have been raised in prior lawsuit if the second suit concerns the same operative nucleus of fact. See Robbins v. District Court of Worth City, Iowa, 529 F.2d 1015 (8th cir. 1970); Goodrich v. Supreme Court of South Dakota, 511 F.2d 316 (8th Cir. 1975); Vorbeck v. Whaley, 478 F. Supp. 1111 (E.D. Mo. 1979).

It is only if the issues were not presented or decided that they may be

relitigated. Goodrich v. Supreme Court of South Dakota, supra.

The court has examined each of plaintiff's claims which are set out in parpagraphs 4-19 of the complaint. In light of the record and briefs and is of the view that each was or could have been raised in the state proceedings and are therefore barred. In this regard defendants' brief amply sets out the record and the court feels no need to repeat it here. Suffice it to say that the bulk of plaintiff's complaints regard the nature of evidence relied upon to find a violation and the use of ethical considerations as a basis for disbarment.

Finally, the court would note that it has also emanined the merits of plaintiff's claim and can find no violation of any constitutional rights.

It is therefore

ORDERED

Dismissed.

May 20, 1980.

C

ORDER DISMISSING SUSPENSION TO PRACTICE BEFORE THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF IOWA.

This matter is before the court pursuant to its order to show cause why he should not be disbarred from practice in this court filed November 26, 1979.

On December 6, 1979, John D. Randall filed his response to the order to show cause. On January 28, 1980 the court denied his application for discovery and evidentiary hearing and directed the respondent to file the record and written briefs and arguments that were before the Supreme Court of Iowa. These documents have now been filed and examined by the court.

On the basis of this examination the court finds that there is support for the conclusion of the Iowa State Supreme Court that Randall's license to practice law in Iowa should be revoked. Further, the court finds that respondent has failed to show good

C

ORDER OF UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF IOWA DISBARRING PETITIONER.

D

ORDER OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA DISBARRING PETITIONER

cause why this court should not enter an order of suspension based upon the action of the Supreme Court of Iowa.

It is therefore

ORDERED

That John D. Randall is hereby barred from practicing law in the Northern District of Iowa and his certificate to practice law in this court is hereby revoked.

May 20, 1980.

D

ORDER DISMISSING SUSPENSION TO PRACTICE BEFORE THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF IOWA.

On November 20, 1979 this court sent to John D. Randall an Order to show cause why he should not be suspended from practice of law in the United States District Court for the Southern District of Iowa based upon the decision of the Supreme Court of Iowa filed November 20, 1979, which revoked his license to practice law in the State of Iowa. On November 30, 1979, John D. Randall filed

his response to this Court's Order of November 20. On December 5, 1979, the Court denied respondent's application for further discovery and an evidentiary hearing and directed the respondent to file the record and written briefs and arguments that were before the Supreme Court of Iowa. The required documents and others have now been filed.

The Court examined the matter referred to above with particular attention to:

(1) Findings of fact, conclusions of law and recommendations of the First Division of the Grievance Commission.

(2) Appellant's breif and argument.

(3) Appellee's brief and argument.

(4) Appellant's reply brief and argument on the review of the Report of the Grievance Commission of the Iowa Supreme Court filed November 20, 1979; and

(5) Respondent's written brief and argument filed in this Court on December 17, 1979.

The Court on the basis of his examination finds that there is support for the conclusion of the Iowa State Supreme Court that the respondent's license to practice law in Iowa should be revoked. The Court further finds that the respondent has failed to show good cause why this Court should not enter an Order of disbarment based upon the action of the Supreme Court of Iowa.

IT IS THEREFORE ORDERED that John D. Randall, the respondent, is hereby barred from practicing law in the Southern District of Iowa and his certificate to practice law in the United States District Court for the Southern District of Iowa is hereby revoked.

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to return the documents filed by Mr. Randall in support of his response to Mr. Randall.

Signed this 17th day of January, 1980.

Code of Professional Responsibility for Lawyers of the State of Iowa, Preamble and Preliminary Statement:

> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.

Code of Professional Responsibility for Lawyers of the State of Iowa, Ethical Considerations:

EC 1-5. A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To law-

yers especially, respect for the law should be more than a platitude.

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-2. A lawyer should not accept proffered employment if his personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3. The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or

withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Amended and effective December 16, 1977.

EC 9-6. Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * * *

(3) Engage in illegal conduct involving a moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 4-101. Preservation of Confidences and Secrets of a Client

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

* * * *

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employ-

ment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104. Limiting Business Relations with a Client

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Code of Iowa, Section 610.24, Grounds of Revocation:

The following are sufficient causes of revocation or suspension:

* * * *

* * * *

3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.

4. Doing any other act to which such a consequence is by law attached.

80-2059
No. 80-2060

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IN THE

Supreme Court of the United States

TERM, 1981

JOHN D. RANDALL, SR.,
Petitioner,

VS.

W. W. REYNOLDSON; CLAY LEGRAND; WARREN J. REES; HARVEY UHLENHOPP; DAVID HARRIS; MARK MCCORMICK; ROBERT G. ALLBEE; ARTHUR A. MCGIVERN; JERRY L. LARSON,
Respondents.

IN THE MATTER OF SUSPENSION TO PRACTICE BEFORE THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF IOWA OF JOHN D. RANDALL

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IN THE MATTER OF: JOHN D. RANDALL, SR.

JOHN D. RANDALL,
Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTONS PRESENTED

1. Did the Courts below properly dismiss for want of subject matter jurisdiction an action brought pursuant to 42 U.S.C. §1983 against the individual justices of the Supreme Court of Iowa seeking an order reinstating Petitioner's license to practice law in Iowa?

2. Was the conduct of the Petition such that any reasonable lawyer would know it was wrong and subject him to discipline, or is the language of the ethical consideration and disciplinary rules under which Petitioner was charged sufficiently clear to give adequate notice of conduct that will be subject to disciplinary action?

3. Did the Eighth Circuit Court of Appeals (a) err in refusing the Petitioner a hearing en banc; (b) deny the Petitioner due process of law and equal protection; and (c) is the Petitioner entitled to invoke Rule 17-1(a) of the United States Supreme Court?

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No.

IN THE

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JOHN D. RANDALL, SR.,
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W. W. REYNOLDSON; CLAY LEGRAND; WARREN J. REES; HARVEY UHLENHOPP; DAVID HARRIS; MARK MCCORMICK; ROBERT G. ALLBEE; ARTHUR A. MCGIVERN; JERRY L. LARSON,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *In the Matter of John D. Randall,* 640 F.2d 898 (8th Cir. 1981).

JURISDICTION

The final order of the Eighth Circuit Court of Appeals affirming the prior rulings of the United States District Courts for the Northern and Southern Districts of Iowa was entered January 21, 1981. Its own opinion and order disbarring the Respondent was entered the same date. Rehearing was denied on March 3, 1981. Petitioner asserts that jurisdiction is conferred by Title 28, *United States Code,* Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 14, Section 1, Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Iowa Code of Professional Responsibility for Lawyers (1973):

> *DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.*

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

EC5-5 A lawyer should not suggest to this client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari directed to the Eighth Circuit Court of Appeals because of its decision upon a consolidated appeal involving four separate proceedings concerning Petitioner's disbarment by the Iowa Supreme Court, the federal district courts for the Northern and Southern Districts of Iowa,

and the Eighth Circuit Court of Appeals. The Respondent justices of the Iowa Supreme Court and the Respondent federal courts had separate counsel. However, since all of these cases now involve common questions of law and fact, it is felt that a consolidated brief for all Respondents is appropriate.

John D. Randall, Sr., was disbarred by order of the Supreme Court of Iowa on November 14, 1979, for violating Disciplinary Rules DR5-101(A) and DR5-104(A) relating to conflict of interest, by representing a corporation, wholly and equally owned by Randall and his business partner, in litigation with a former employee, and for drawing a will for the business partner naming Randall as the sole beneficiary, contrary to Ethical Consideration 5-5, *Iowa Code of Professional Responsibility for Lawyers. Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Randall,* 285 N.W.2d 161 (Iowa 1979) (hereinafter *Committee* v. *Randall).* A Petition for Certiorari was filed with this Court and denied on May 12, 1980, ___ U.S. ___, ___ S.Ct. ___, 64 L.Ed.2d 802 (1980).

The District Courts for the Northern and Southern Districts of Iowa subsequently issued orders to show cause why Randall should not be barred from practicing in their courts. After written submissions by Randall and the Committee on Professional Ethics and Conduct, orders were entered disbarring Randall from the Southern District of Iowa on January 17, 1980, and from the Northern District of Iowa on May 20, 1980.

Randall also filed in the Northern District of Iowa an action against the individual Justices of the Supreme Court of Iowa pursuant to 42 U.S.C. §1983 styled a Petition for Declaratory Relief and to Compel Issuance of a License to Practice Law in the State of Iowa. In essence, Randall's Petition alleged that he was denied due process of law because (1) he was denied discovery concerning the investigatory procedures of the Chairman of the Committee on Professional Ethics and Conduct and

the "prosecuting attorney" for the Committee;[1] (2) the panel members of the Grievance Committee which heard the evidence in the first instance were biased against him; (3) the charged violations of the *Code of Professional Responsibility* which formed the basis for discipline were not supported by sufficient evidence; and (4) he lacked notice that he could be disciplined for violation of those portions of the *Code of Professional Responsibility* known as "Ethical Considerations." Randall's Petition also claimed that he was denied equal protection of the laws because he was allegedly disciplined more severely than others similarly situated.

The Respondent Justices moved to dismiss the §1983 action on the grounds, *inter alia,* (1) that 42 U.S.C., §1983 does not confer upon federal district courts subject matter jurisdiction to review by appeal or collateral attack a final judgment of a state supreme court disciplining a member of that court's bar for professional misconduct, (2) that Randall's federal claim is grounded in the same operative nucleus of fact as the state court proceeding and is, therefore, barred by the doctrine of res judicata, and (3) the petition fails to state a claim upon which relief can be granted. The district court found merit in all three grounds and dismissed the petition on May 20, 1980.

Appeals from the federal court disbarments were consolidated with an appeal from the dismissal of the §1983 action and consideration of whether Randall should be disbarred from the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed all orders of the district courts and disbarred Randall from the Court of Appeals.

---

[1]Appendix "A", Rule 3.4. The Rules of Procedure, the Professional Ethics and Conduct Committee of the Iowa State Bar Association are set forth in full in Appendix "A". Supreme Court of Iowa Rule 118 governing the procedure before the Ethics Committee and Grievance Commission is set in full as Appendix "B" to this Brief.

The Eighth Circuit held that the lower federal courts are without jurisdiction to review a state judgment of disbarment, that certiorari to this Court is the only appropriate mode of review and applied the doctrine of res judicata to those issues which it concluded were actually litigated in the state proceeding. Nonetheless, the due process and equal protection issues raised in the §1983 petition were fully considered and found to be without merit by the Eighth Circuit. In particular, the court below concluded that a disbarment based in part upon violation of an ethical consideration did not violate due process.

In reviewing the federal district court disbarments, the Court of Appeals gave due respect to the state court judgment, but made its own independent review. The Iowa Supreme Court held that since Randall did not include in his brief any issue of due process of law, that issue was deemed waived. However, the Court of Appeals held that "that constitutional issue" was squarely before it in its own disbarment proceeding and thereafter reviewed, at length, the Petitioner's argument. The Court of Appeals overruled Petitioner's objections in all respects.

John D. Randall, the Petitioner was an attorney, business associate, and friend of Lovell Myers. These various relationships had their inception sometime in the early 1940's and continued until Myers' death in 1976.

On February 17, 1973, an individual known as Gilbert Morningstar accused Lovell Myers and Petitioner of forging a deed for approximately eighty acres of land from Gilbert Morningstar and his wife to a corporation, Myers Farms, Inc., wholly owned by Petitioner and Lovell Myers. On the same day, Lovell Myers admitted the deed forgery and the Petitioner and Lovell Myers, on behalf of the corporation, quit claimed this eighty acres of land back to Gilbert Morningstar.

Twenty-five days after the accusation by Gilbert Morningstar, on March 14, 1973, the Petitioner drafted a Last Will

and Testament for Lovell Myers, which was shortly thereafter executed by Myers, leaving all of Myers' property (which had a gross value of approximately two million dollars) to Petitioner. Lovell Myers' daughter, Marie Jensen, and her family with whom Myers had maintained a close family relationship over the years, were not mentioned in the will. Upon the offering by Petitioner of the will for probate, Lovell Myers' daughter brought suit to set aside the will. A mortgage remained as a first lien against the eighty acres that the Petitioner and Lovell Myers (on behalf of Myers Farms, Inc.) had quit claimed to Gilbert Morningstar. Morningstar then brought a civil action against Myers Farms, Inc. for slander of title.

During discovery depositions in both cases, the Petitioner alleged that this eighty acres was the property of Myers Farms, Inc., and, further, that Lovell Myers and Gilbert Morningstar had, over the years, by a common scheme misappropriated corporate assets. Despite the conflict which arose between Petitioner's interests and those interests of Lovell Myers when Petitioner believed that Myers and Gilbert Morningstar had conspired against him to defeat his ownership of the eighty acres, Petitioner continued to act as attorney for both Myers and the corporation. The will contest was later settled for a value of approximately one and one-half million dollars.

REASONS FOR DENYING THE WRIT

This Court declined to review the disbarment of John Randall when certiorari was sought from the decision of the Supreme Court of Iowa. ___ U.S. ___, ___ S.Ct. ___, 64 L.Ed.2d 802 (1980). Three federal courts have now satisfied themselves that disciplinary action against Randall was required. There is even less reason for review by this Court now than there was in 1980.

Supreme Court Rule 17 sets forth Considerations Governing Review or Certiorari. Petitioner suggests no conflict in the circuits and no conflict between the decision of the Eighth Circuit and the decisions of this Court or the highest court of a state. It will be demonstrated below that this petition does not present an important question of federal law which should be settled by this Court.

I.

42 U.S.C. §1983 Does Not Confer Upon Federal District Courts Subject Matter Jurisdiction To Review By Appeal Or Collateral Attack A Final Judgment Of The Highest State Court Disciplining A Member Of That Court's Bar For Professional Misconduct.

In declining to afford appellate review of a judgment of the Supreme Court of Iowa, the federal courts below were merely following a long-established and widely accepted rule in the circuits.

The Eighth Circuit followed its own leading case on point. In *Jones* v. *Hulse*, 391 F.2d 198 (8th Cir. 1968), *cert. denied*, 393 U.S. 889 (1968), an attorney was suspended for three years from the practice of law by the Missouri Supreme Court for solicitation of personal injury claims. He petitioned this Court for a writ of certiorari. When the petition was denied, he filed a §1983 action in the district court alleging that he had been denied due

process because the Missouri Supreme Court had been affected by perjurious testimony offered by the Advisory Committee of the Missouri Bar Association. In affirming the district court's dismissal for lack of subject matter jurisdiction, the Eighth Circuit relied upon the holding in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923):

> "If the constitutional questions stated in the * * * [complaint] actually rose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [Citations omitted] Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. * * * To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

The *Rooker* holding is fully applicable here because, in exercising its judgment concerning the existence of misconduct by Randall and the necessity for discipline, the Supreme Court of Iowa performed a *judicial* act, *In re Summers,* 325 U.S. 561, ____ (1945), reviewable in this Court, see e.g. *In re Primus,* 436 U.S. 412 (1978); *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978). As developed above, disciplinary proceedings in Iowa afford the respondent (the Petitioner herein) a trial-type hearing before the Grievance Commission and de novo review with findings of fact and conclusions of law in a formal opinion by the Supreme Court of Iowa. There can be no doubt that the Supreme Court of Iowa functioned in a judicial capacity in the proceeding that led to Randall's disbarment.

It appears that every circuit to have considered the question has reached an identical result. See *Rivera* v. *Monge*, 587 F.2d 539 (1st Cir. 1978); *Sawyer* v. *Overton*, 595 F.2d 252 (5th Cir. 1979); *Coogan* v. *Cincinnati Bar Ass'n.*, 431 F.2d 1209 (6th Cir. 1970); *Ginger* v. *Circuit Court for Wayne County*, 372 F.2d 621 (6th Cir. 1967); *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977); *MacKay* v. *Nesbett*, 412 F.2d 846 (9th Cir. 1969); *cert. denied*, 396 U.S. 960 (1969); *Doe* v. *Pringle*, 550 F.2d 596 (10th Cir. 1976); *Gately* v. *Sutton*, 310 F.2d 107 (10th Cir. 1962).

Lest there be confusion, respondents do not maintain that a federal district court is totally without jurisdiction to consider constitutional challenges to the fairness of state attorney disciplinary proceedings. The rule of *Jones* v. *Hulse* is not applicable to an anticipatory challenge to the adoption or administration of rules and regulations of general application. See *Doe* v. *Pringle*, 550 F.2d 596, 599 (10th Cir. 1976); *Brown* v. *Board of Bar Examiners*, 623 F.2d 605, 610 (9th Cir. 1980). In the bar admission context, this Court's decision in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971) illustrates a proper invocation of original federal jurisdiction. There, organizations and individuals representing law students and law graduates who intended to seek admission to the New York bar challenged the rules and screening procedures employed to determine an applicant's character and fitness to practice. The claim of the plaintiff was not that any one candidate had been improperly denied admission to the bar, but rather that the mere existence of the screening system constituted an impermissible "chilling effect" on the exercise of First Amendment rights to freedom of speech and association. Plaintiffs lost on the merits, but there appeared to be general agreement that the district court had subject matter jurisdiction.

Randall, however, seeks *reinstatement* of his license to practice law in Iowa — not a general declaration that a rule is unconstitutional. Randall's complaints all focus upon the particular procedures employed by and the result reached by the court in his particular case. In effect, Randall seeks a *reversal* of the order of the Supreme Court of Iowa. But that relief may be provided only by this Court on *direct* review and, as the circuits have held unanimously, may not be provided by a federal district court in an original action.

II.

The Conduct Of The Petitioner Was Such That Any Reasonable Lawyer Would Know It Was Wrong And Subject Him To Discipline; In Any Event, The Language Of The Ethical Considerations And Disciplinary Rules Under Which Petitioner Was Charged Is Sufficiently Clear So As To Give Adequate Notice Of Conduct That Will Be Subject To Disciplinary Action.

Randall apparently urges this Court to review the abstract question of whether due process permits discipline of an Iowa attorney, in whole or in part, for conduct contrary to ethical considerations in the *Iowa Code of Professional Responsibility for Lawyers*. The argument seems to be that an ethical consideration, merely by virtue of its classification in the *Code* becomes constitutionally inadequate.

Because this Court can consider only concrete cases, however, it may be helpful to focus on the specifics of this matter. First, it should be noted that Randall was sanctioned for violations of disciplinary rules concerning conflicts of interest as well as for violation of a particular Ethical Consideration, EC5-5.

Second, Randall raised a vagueness challenge to EC5-5 in the Answer he filed in the proceeding before the Grievance Commission. He then voluntarily abandoned the claim and did not

raise the issue in his brief or on oral argument before the Supreme Court of Iowa. Rather, he argued that he did not violate EC5-5. This shift in tactics may be explained by the fact that the decision in *Committee on Professional Ethics* v. *Behnke,* 276 N.W.2d 838 (Iowa 1979), *appeal dismissed,* 444 U.S. 805 (1979), was filed by the Supreme Court of Iowa on March 21, 1979, and Randall's Brief and Argument was filed on June 25, 1979. *Behnke* rejected the precise vagueness challenge to EC5-5 that Randall would now raise, in a context where Behnke was disciplined *solely* for violation of that Ethical Consideration. This Court has indicated that dismissal of an appeal for want of a substantial federal question should be treated as a precedent. *Meek* v. *Pittinger,* 421 U.S. 349, 367 (1975); *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974). Randall suggests no sufficient reason why the *Behnke* decision should be reconsidered.

Third, Randall resurrected the vagueness claim in the first petition for certiorari filed with this Court in March, 1980, and denied on May 12, 1980. ___ U.S. ___, ___ S.Ct. ___, 64 L.Ed.2d 802 (1980).

Finally, after the petition for certiorari was denied by this Court, Randall included the claim in the 42 U.S.C. §1983 action. Both the district court and the Eighth Circuit rejected the claim on the merits and concluded Randall had ample notice he was subject to discipline.

In making the assertion of unconstitutionality, the Petitioner has assumed a very heavy burden of proof in overcoming the presumption of constitutionality and negating every conceiveable interpretation favoring constitutionality. *Fleming* v. *Nestor,* 363 U.S. 603, 617 (1960); *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973); *Moorman Mfg. Co.* v. *Bair,* 254 N.W.2d 737 (Iowa 1977), *aff'd.* 98 S.Ct. 478 (1978).

An allegation of vagueness was made in *Complaint of Rook,* 556 P.2d 1351, 276 Or. 695 (1976) against DR1-102(1) (a lawyer

should not violate a disciplinary rule) and DR1-102(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice). A district attorney had been accused of refusing to plea bargain with criminal defendants on the same basis as previously offered to other criminal defendants as long as such persons were represented by either of their attorneys. The Court disposed of this issue as follows:

> "As for the contention by the accused that the terms of DR1-102(1) and (5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. See *Board of Medical Examiners* v. *Mintz,* 233 Or. 441, 448, 378 P.2d 945 (1963). We have previously held that such a proceeding is not a criminal proceeding and that the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. See *In re Gronnert,* 242 Or. 233, 236, 391 P.2d 772 (1965). See also, *In re Laske,* 269 Or. 146, 158, 523 P.2d 1262 (1974). This is particularly true where, as in this case, no First Amendment freedoms have been violated. Cf. *State* v. *Nelson,* 210 Kan. 637, 504 P.2d 211 (1972)." 556 P.2d at 1357.

In the case of *State* v. *Nelson,* 210 Kan. 637, 504 P.2d 211 (1972), an attorney was charged with violating DR1-102(A)(5) in connection with certain statements he made to the newspapers covering a lawsuit in which his client lost. The statements were critical of the courts in general. The attorney asserted that the word "prejudicial" as it appears in DR1-102(A)(5) was unconstitutionally vague. The Court stated as follows:

> ". . .Respondent's position is unsupported in both instances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary." 504 P.2d at 214.

This Court in *In re Ruffalo,* 390 U.S. 544 (1968) made certain statements appropos to the case at bar:

> "A relevant inquiry in appraising the decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals, Sixth Circuit, have provided petitioner and other members of its bar with a general standard for disbarment:
>
> > 'When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court. (Rule 6(3), Court of Appeals for the Sixth Circuit.)'
>
> "Even when a disbarment standard is unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, wili be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct for which all responsible attorneys would recognize as improper for a member of the profession." 390 U.S. at 554-555."

The Petitioner cites two cases which considered the question of vagueness in considering the constitutionality of DR7-107. Both cases, *Hirschkop* v. *Snead,* 594 F.2d 356 (4th Cir. 1979) and *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1974), *cert. denied,* 427 U.S. 912 (1976), concluded as they did because of First Amendment considerations. The first amendment is not involved here.

It is submitted that the only vagueness in this matter is how Petitioner could believe his conduct to be proper under any definition of any word or standard involved in the proceeding. In essence, the Petitioner is saying he did not understand that adherence to the principles of "common honesty" as well as the *Iowa Code of Professional Responsibility for Lawyers* prohibited his conduct. The Petitioner seeks to have the Court judge his conduct by some nonexistent standard. In arguing the denial of due process, he apparently wished to have the Iowa Federal Courts and the Court of Appeals read the *Code of Professional Responsibility* in some strict, legalistic and technical manner. This would be contrary to interpretations of the *Code* by the Iowa Supreme Court. *Committee* v. *Crary,* 245 N.W.2d 298, 307 (Iowa 1976). It is respectfully submitted that the *Iowa Code of Professional Responsibility for Lawyers* is sufficiently clear by which to judge an attorney's conduct or fitness and that no lawyer should have any difficulty in concluding that Petitioner's conduct was improper and reflects a lack of fitness to practice law.

Certainly, the language of EC5-5 is reasonably specific. It provides in pertinent part:

> "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

No attorney is forced to "guess" the meaning of EC5-5 to avoid the prospect of discipline for misconduct. An attorney who declines to prepare any instruments in which he or she is named beneficially will plainly have no difficulty. An attorney who believes he is faced with "exceptional circumstances," may, in Iowa, receive guidance in the form of an Ethics Opinion. Randall did not do that.

Indeed, Randall's argument does not focus on the critical language at all. His argument seizes upon the allegedly "merely aspirational" character of "Ethical Considerations" in general.

Presumably, however, the legal significance of particular provisions of state law is not a federal question. The Supreme Court of Iowa has held consistently since 1973, when the issue first arose, that Iowa lawyers are not free to regard "ethical considerations" as merely aspirational, if by that it is meant that none of them proscribe conduct that may subject an attorney to serious discipline. See *State* v. *Thompson,* 208 N.W.2d 926, 927 (Iowa 1973); *Matter of Frerichs,* 239 N.W.2d 764, 769 (Iowa 1976); *Committee on Professional Ethics* v. *Behnke,* 276 N.W.2d 838, 840 (Iowa 1979).

The Eighth Circuit recognized EC5-5 did not mandate some novel, demanding standard of conduct. Rather it codifies common sense and is the current articulation of a long-standing prohibition. The footnotes to EC5-5 and EC5-7 make clear that this conduct has long been proscribed and a unanimous line of authority confirms that claim. See, e.g., *In re Krotenberg,* 11 Ariz. 251, 527 P.2d 510 (1974); *Columbus Bar Association* v. *Ramey,* 32 Ohio St.2d 91, 290 N.E.2d 831 (1972); *In re Jones,* 254 Or. 617, 462 P.2d 680 (1969); *In re Knneland,* 233 Or. 241, 377 P.2d 861 (1963); *In re MacFarlane,* 10 Utah 2d 217, 350 P.2d 631 (1960); *In re Moore,* 218 Or. 403, 345 P.2d 411 (1959); *Lantz* v. *State Bar of California,* 212 Cal. 213, 298 P. 497 (1931). See also the numerous cases cited at 98 A.L.R.2d 1234. These authorities establish:

(1) A reasonably informed attorney would be on notice that his conduct in drafting a will in which he is a named beneficiary will subject him to disciplinary action. This rule was well established by cases before Randall's conduct so his claim of lack of notice is without merit.

(2) The prohibition contained in EC-5 is based on the long and unhappy experience of the Bar in attempting to regulate situations fraught with potential for over-reaching and abusing clients. EC5-5 is merely the current articulation of a long-standing prohibition.

As all courts, state and federal, which have considered Randall's conduct have concluded, any reasonable attorney in his circumstances should have known that making himself Myers' heir would be grounds for discipline.

III.

Did The Eighth Circuit Court Of Appeals (A) Err In Refusing The Petitioner A Hearing En Banc; (B) Deny The Petition Due Process Of Law And Equal Protection; And (C) Is The Petitioner Entitled To Invoke Rule 17-1(a) Of The United States Supreme Court?

Petitioner now attacks the Eighth Circuit in the same manner as he previously attacked the Supreme Court of Iowa and the Iowa Federal Courts. First, he attacks Senior Judge Gibson as not being qualified to sit upon the division that heard his case. Senior Judge Gibson is a "judge of the United States" as defined in 28 U.S.C. §451. He has retired. He is still available to perform judicial duties. He has been thus assigned to perform judicial duties pursuant to 28 U.S.C. §294(c). One of these duties was to participate in the determination of Petitioner's appeal. A judge on senior retired status, while sitting by assignment, has the same status as an active judge. *United States* v. *Moore,* 101 F.2d 56 (2nd Cir. 1939) *cert. denied,* 306 U.S. 664, 59 S.Ct. 788, 83 L.Ed. 1060.

The Circuit Court sits in divisions. 28 U.S.C. §46(a). The Circuit Court directs its own business. 28 U.S.C. §46(b). A division consists of not more than three judges unless a hearing en banc is ordered. 28 U.S.C. §46(c). The Eighth Circuit sits in divisions of not more than three judges with a majority constituting a quorum. A division is "the court". Appendix "C", Rule 2(a). In any event, the Petitioner's case was heard and determined by a quorum.

Cases are heard en banc at the Circuit Court level when "(1) consideration by the full Court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." F.R.A.P. 35. Petitioner does not suggest that his case conflicted with any other decision. The Circuit Court must have wide discretion to decide what cases involve questions of exceptional importance. Petitioner has not suggested any abuse of discretion. Rule 7 implements this rule of appellate procedure. See Appendix "C".

Appellate rule 46(b) provides for the procedure to hear and determine if an attorney should be suspended or disbarred. Petitioner does not suggest that this procedure was violated. Even though he made no request, he was afforded a hearing upon the Eighth Circuit's consideration of response to the show cause order.

Petitioner is displeased with the decision of the Court of Appeals. The fact that he lost does not mean his rights to due process of law were violated. The opinion of the Court below amply demonstrates that his constitutional rights were fully considered. He committed serious ethical infractions and must now stand and answer for them.

CONCLUSION

For all the reasons set forth herein, the Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

RULES OF PROCEDURE PROFESSIONAL ETHICS AND CONDUCT COMMITTEE OF THE IOWA STATE BAR ASSOCIATION

[Adopted by Supreme Court Order December 12, 1974]

1.1 Complaints. Complaint forms shall be available to the public from the secretary of the Iowa state bar association or the chairman of the committee.

1.2 Filing. Complaints shall be accepted from any person, firm or other entity believing that an Iowa lawyer has been guilty of a disciplinary infraction.

a. Complaint must be sworn to, except when filed by an officer of the court.

b. Complaints shall include whatever exhibits complainant desires to submit.

c. They shall be filed, without charge, with the secretary of the Iowa state bar association.

d. The committee may, upon its own motion, initiate any investigation or disciplinary action. [Court Order June 20, 1980]

2.1 Secretary's procedure. Upon receiving a complaint in proper form as provided in section 1 hereof, the secretary of the Iowa state bar association shall:

a. Make a card record indicating the date filed, name and address of complainant, name and address of respondent lawyer, with a brief statement of the charges made. This card ultimately also shall show the final disposition of the matter when it is completed.

b. Forward the original and a duplicate for each lawyer charged in such complaint to the chairman of the committee.

c. The secretary shall keep all files in permanent form and confidential, unless otherwise provided or directed in writing by the chairman of the committee for disciplinary purposes or by a specific rule of the supreme court of Iowa; provided, however, that all such files shall be available for examinaton and for reproduction therefrom, by the designated officer or agent of the client security and attorney disciplinary commission, pursuant to proceedings under supreme court rule 121.

d. Any such files shall be open to the inspection of the lawyer complained against.

3.1 Committee procedure. Upon receipt of any complaint the chairman of the committee shall notify the complainant in writing that the complaint has been received and will be acted upon.

3.2 The chairman shall forward to the respondent by restricted, certified mail, marked "Confidential", a copy of the complaint, requesting a written response thereto, and copies of the committee rules and of supreme court rule 118.

3.3 If after thirty days, no such response from respondent has been received, he shall be notified by restricted certified mail that unless he responds thereto within ten days from receipt of notice, complaint may be filed with the grievance commission for failure so to respond, and concerning all or any portion of the matter about which complaint was made, and the committee shall proceed therewith thereafter, if no response is received.

3.4 Upon receipt of response the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent in writing, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting, or

c. Arrange for investigation of the complaint either by a member of the young lawyers section of the Iowa state bar association, the committee counsel or another person, whichever in the judgment of the chairman is appropriate.

3.5 When the report and recommendation of investigator is returned to the committee, which shall be within a reasonable time, the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting.

3.6 If either witnesses or the respondent or complainant or any of them is required to give testimony before the committee, such person or persons shall be given at least seven days' written notice in advance of the hearing-meeting at which they are requested to attend and testify.

4.1 Hearing-meeting. Hearing-meetings shall be held quarterly, as nearly as possible. A majority of the committee shall constitute a quorum. The chairman or his designate shall see to the preparation of a record of such meetings which shall become a part of the permanent files of the Iowa state bar association. Any evidence taken shall be under oath and may be made of record. Upon completion of the consideration of any matter before the committee, the members, by majority vote of those present shall:

4.2 Continue the matter if necessary for appropriate reasons or purposes, or

4.3 Dismiss the complaint, or

4.4 Admonish the lawyer or lawyers concerned, or

4.5 Reprimand the lawyer or lawyers involved, or

4.6 File complaint before the grievance commission of the supreme court of Iowa, as complainant, and, thereafter shall:

4.7 In cases of dismissal, so notify complainant and respondent.

4.8 In cases of admonition, notify complainant that "appropriate action has been taken"

4.9 In cases where complaint is filed before the grievance commission, prosecute said complaint to final determination.

5.1 Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Profesional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the committee. Such applcation shall be made in writing by restricted, certified mail, and shall include such documentation as the applicant deems appropriate. The committee thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

5.2 If the committee is of the opinion that no relief should be granted in response to any such application and no changes are necessary, it shall make a determination to that effect and then shall proceed as provided hereinafter.

5.3 If the committee concludes that relief should be granted in response to such application, it shall make its determination to that effect and submit the same to the supreme court by filing the same with the clerk of the court as a recommended amendment to the Iowa Code of Professional Responsibility for

Lawyers, universally applicable to all lawyers admitted to practice in Iowa.

5.4 Within ten days after the committee had made its determination under paragraphs 5.1 and 5.2 herein-above, it shall notify applicant of its determination by furnishing said applicant a copy thereof by restricted, certified mail. Applicant shall have thirty days from the date of the said mailing by the committee to the applicant to take exception to all or any part of the determination of the committee. Said exceptions shall be taken by filing with the committee within said thirty-day period, complete written notice and documentation of the exceptions and the reasons therefor, which shall be forwarded to the committee by restricted, certified mail.

5.5 Within thirty days from the receipt of the exceptions, the committee shall file with the clerk of the court a copy of said exceptions and documentations attached thereto, together with any written response which the committee seeks to make to the court together with a certification of its mailing to the applicant a copy of its response to the exceptions, in order that the court may determine the whole matter, with or without hearing, as to the court may appear appropriate and desirable.

5.6 Nothing herein contained shall permit any publication other than provided in DR 2-101 or DR 2-105 unless and until said DR 2-101 or DR 2-105 shall be amended by the court. No applicant for expanded information for disclosure or other publication under said rules shall make such disclosure or publication until the same specifically has been approved by rule of the court. [Adopted by Supreme Court Order May 18, 1978]

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APPENDIX "B"

GRIEVANCE COMMISSION

Court Rule 118. Complaint procedure.

Referred to in Rules EC 2—11, DR 2-101, DR 2-105, Disciplinary Guidelines, Grievance Committee Rules 3 and 7;-Ethics Procedure Rule 3.2; Court Rules 121.2 *"c"*(5), 121.3 *"i"*(8); 121.4 *"d"*(2); 121.5 *"a"*(2); 123.5 *"b"*; R.P.P. 5 *"d"*

118.1 Grievance commission. There is hereby created the Grievance Commission of the Supreme Court of Iowa whose members shall be the Committee on Grievances of the Iowa State Bar Association and their successors as confirmed by order of this court. Such members are appointed commissioners of this court. The grievance commission, or a duly appointed division thereof shall hold hearings and receive evidence concerning alleged violations, wherever such violations occur, of the Iowa Code of Professional Responsibility for Lawyers or laws of the United States, and the laws of the state of Iowa or any other state or territory within their respective jurisdictions by lawyers who are members of the bar of this court. The grievance commission shall have such other powers and duties as are provided in these rules.

118.2 Procession of complaints. The members of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association and their successors, as confirmed by order of this court are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States of the state of Iowa. Upon completion of any such investigation the committee on professional ethics and conduct shall either dismiss the complaint made, or admonish or reprimand the complained against attorney, or file and prosecute the complaint before the grievance commission or any division thereof.

Referred to in R.P.P. 5 "d"

118.3 Reprimand. In event an attorney is reprimanded by the committee on professional ethics and conduct, a copy of the reprimand shall be filed with the clerk of the grievance commission who shall immediately forward a copy thereof, by restricted certified mail, to the attorney reprimanded, therein stating that he or she has thirty days from the date of receipt thereof to file exceptions thereto with the clerk of the grievance commission. If the attorney fails to file an exception such failure shall constitute a waiver of any further proceedings and a consent that the reprimand be final and public. In that event, the clerk of the grievance commission shall cause a copy of the reprimand to be forwarded to the clerk of this court, together with proof of the aforesaid service thereof and a statement that no exceptions had been filed within the time prescribed. This court shall thereupon cause the reprimand to be spread upon the records of the court as a public document. In event, however, the attorney concerned files timely exception to the reprimand, no report of the reprimand shall be made to the clerk of this court and the reprimand shall be stricken from the records. The committee on professional ethics and conduct may, however, proceed further with any complaint against such attorney before the grievance commission. When a reprimand has been filed but exception is duly taken thereto such reprimand shall not be admissible in evidence in any hearing before the grievance commission.

118.4. Rules. The grievance commission and the committee on professional ethics and conduct shall each adopt reasonable rules prescribing the procedure to be followed in all disciplinary proceedings before each such body, which rules shall be subject to approval by this court.

118.5. Complaints. Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chairman of the committee on professional ethics and con-

its rules or the time provided for such answer has expired, the grievance commission shall immediately upon the expiration of thirty days from the date the complaint was filed set the matter for hearing and notify all parties thereof at least ten days prior to the date set for such hearing, by restricted certified mail or personal service. If neither party has commenced any discovery within thirty days of the filing of the complaint, the hearing date shall be set not less than forty-five days nor more than sixty days after the filing of the complaint. If a party has commenced discovery, the hearing date shall be set not less than sixty days nor more than seventy-five days from the date the complaint is filed. The commission may grant reasonable continuances but only upon written application supported by affidavit. Proceedings and hearings before the grievance commission or any division thereof shall be confidential unless the attorney involved requests otherwise.

118.8 Subpoenas. The clerk of the district court of the county in which any disciplinary hearing is to be held shall issue subpoenas of all kinds upon request of the grievance commission, the complainant, or the attorney against whom a complaint has been filed. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses, and shall cause such testimony to be officially reported by a court reporter. The grievance commission shall report to the supreme court of Iowa the failure or refusal of any person to attend or testify in response to any subpoena or any ruling of said commission.

118.9. Decision. At the conclusion of a hearing upon any complaint against an attorney the grievance commission shall dismiss the complaint, or reprimand the attorney, or recomment to this court that the license to practice law of the accused attorney be suspended or revoked. If the grievance commission reprimands the attorney or recommends suspension or revocation of the attorney's license, it shall report to this court, in writing, its findings of fact, conclusions of law, and recommen-

dations. The commission may permit a reasonable time for the parties to file post hearing briefs and arguments. The disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument. If the commission cannot reasonably make its determination or file its report within such time limit, it shall report that fact and the reasons therefor to the parties and the clerk of this court. Any determination or report of the commission need only be concurred in by a majority of the commissioners sitting. Any commissioner has the right to file with this court his or her dissent from the majority determination or report. Such matter shall then stand for final disposition in this court. If the grievance commission dismisses the complaint, no report shall be made to this court, except as provided in rule 118.20. Any report of reprimand or recommendations for license suspension or revocation shall be a public document upon the filing thereof with the clerk of this court.

Referred to in Ct.R. 118.11

118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. If no exceptions are filed or no appeal is taken as hereinafter provided in these rules, the court shall proceed to determine the matter.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: Conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

118.11 Exceptions and appeal. The respondent shall have twenty days to file with the clerk of this court a statement of exceptions to such report filed by the grievance commission pursuant to rule 118.9 and to give notice of appeal therefrom to this court. Such appeal shall thereafter be reviewed de novo by this court upon the record made before the grievance commission, and shall proceed as provided for appeals of civil cases. The complainant, within twenty days after filing of final disposition of a case by the grievance commission may apply to this court for permission to appeal from a ruling, report, or recommendation of the grievance commission. This court may grant such appeal, but not ex parte, and if the appeal is granted, it shall proceed as provided in appeals of civil cases. If such appeal is from the grievance commission's dismissal of a complaint, or of any charge contained therein, such appeal shall remain confidential. In event, however, this court reverses or modifies the report of the grievance commission, such court order of reversal or modification shall become a public record.

118.12. Suspension. In event an order of this court provides for the suspension of the license of an attorney to practice law, such suspension shall continue for the minimum time specified in such order and until this court has approved the attorney's written application for reinstatement.

Any attorney suspended shall refrain, during such suspension, from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns.

118.13. Application for reinstatement. An application for reinstatement from any suspension shall be filed with the clerk of this court not more than sixty days prior to expiration of such suspension or time fixed for making application therefor in accordance with the provisions of court rule 117. In addition thereto the applicant shall state, in said application, that he or

she had complied in all respects with the orders and judgments of this court relating to the suspension. The applicant shall also submit to this court satisfactory proof that he or she, at time of the application, is of good moral character and in all respects worthy of the right to practice law.

118.14. Conviction of a crime. Upon receipt by this court of satisfactory evidence that an attorney had pled guilty to, or nolo contendere to, or has been convicted of a crime which would be grounds for license suspension or revocation, such attorney may be temporarily suspended from the practice of law by this court regardless of the pendency of an appeal. Not less than twenty days prior to the effective date of such suspension, the attorney concerned shall be notified, in writing directed by restricted certified mail to his last address as shown by the records accessible to this court, that he has a right to appeal before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to him in written form at a later time.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns.

For good cause shown, this court may set aside an order temporarily suspending an attorney from the practice of law as hereinabove provided, upon application by such attorney and hearing thereon in accordance with court rule 117, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

An attorney temporarily suspended under the aforesaid provisions of this rule shall be promptly reinstated upon the filing of a good and sufficient certificate disclosing the underlying conviction of a crime has been finally reversed or set aside, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

The clerk of any court in this state in which an attorney has pled guilty or nolo contendere to, or been convicted of a crime as aforesaid shall, within ten days thereafter transmit a certificate thereof to the clerk of this court.

118.15. Disbarment on consent. An attorney subject to investigation or a pending proceeding involving allegations of misconduct subject to disciplinary action may acquiesce in his or her disbarment, but only by delivering to the grievance commission an affidavit stating he or she consents to disbarment and that (1) the consent is freely and voluntarily given absent any coercion or duress, with full recognition of all implication attendant upon such consent; (2) he or she is aware of a presently pending investigation into, or proceeding involving allegations that there exist grounds for discipline the nature of which shall be specifically set forth; (3) he or she acknowledges the material facts so alleged are true; and (4) in event proceedings were instituted upon the matters under investigation, or if existent proceedings were pursued, he or she could not successfully defend against same.

Upon receipt of such affidavit the grievance commission shall cause same to be filed with the clerk of this court whereupon this court shall enter an order disbarring such attorney on consent.

Any order disbarring an attorney on consent shall be a matter of public record. However, the affidavit required as aforesaid shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

118.16. Disability suspension. In event an attorney shall at any time in any jurisdiction by duly adjudicated a mentally incapacitated person, or an alcoholic, or a drug addict, or shall be committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which any such adjudication or commitment is entered shall, within ten days thereafter, certify same to the clerk of this court.

Upon the filing of any such certificate or a like certificate from another jurisdiction this court may enter an order suspending the license of such attorney to practice law in this state until further order of this court. Not less than twenty days prior to the effective date of such suspension, the attorney concerned or his or her guardian and the director of the institution or hospital to which such attorney has been committed, if any, shall be notified, in writing directed by restricted certified mail to his last address as shown by the records accessible to this court, that he has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to him in written form at a later time. A copy of such suspension order shall be given the suspended attorney, or to his or her guardian and the director of the institution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as this court may direct.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns.

No attorney suspended due to disability under the aforesaid provisions of this rule may engage in the practice of law in this state until reinstated by order of this court. Any attorney so suspended shall be entitled to apply for reinstatement to active status once each year or at such shorter intervals as this court may, in the suspension order, provide or specify. An attorney suspended due to any aforesaid disability may be reinstated by this court upon a showing, by clear and convincing evidence, that the attorney's disability has been removed and he or she is fully qualified to resume the practice of law. Upon the filing of an application for reinstatement this court may take or direct any action deemed necessary or proper to determine whether such suspended attorney's disability has been removed, including a direction for an examination of the applicant by such qualified medical experts as this court shall designate. In its discretion this court may direct that the expenses of such an examination be paid by the petitioning attorney.

The filing of an application for reinstatement to active status by an attorney suspended due to disability shall constitute a waiver of any doctor-patient privilege with regard to any treatment of the petitioning attorney during the period of his or her disability. Such attorney shall also set forth in his or her application for reinstatement the name of every psychiatrist, psychologist, physician and hospital or any other institution by whom or in which the petitioning attorney has been examined or treated since his or her suspension due to disability, and shall also furnish to this court written consent that any such psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated as aforesaid may divulge any and all information and records requested by this court or any court-appointed medical experts.

Where an attorney has been suspended due to any aforesaid disability and thereafter, in proceedings duly had, he or she

shall be judicially held to be competent or cured, this court may dispense with further evidence regarding removal of his or her disability and may order his or her reinstatement to active status upon such terms as are deemed reasonably proper and advisable.

118.17. Reciprocal discipline. Any attorney admitted to practice in this state, upon being subjected to professional disciplinary action in another jurisdiction or in any federal court, shall promptly advise the grievance commission, in writing, of such action. Upon being informed that an attorney admitted to practice in this state has been subjected to discipline in another jurisdiction or any federal court, the grievance commission shall obtain a certified copy of such disciplinary order and cause same to be filed in the office of the clerk of this court.

Upon receipt of a certified copy of an order disclosing an attorney admitted to practice in this state has been disciplined in another jurisdiction or any federal court, this court shall promptly give notice thereof by restricted certified mail or personal service directed to such attorney containing: (1) A copy of said disciplinary order from the other jurisdiction or federal court, and (2) an order directing that such disciplined attorney inform this court, within thirty days after receipt of said notice, of any claim by such attorney that imposition of identical discipline in this state would be too severe, too lenient or otherwise unwarranted, giving the specific reasons therefor. A like notice shall be mailed to the committee on professional ethics and conduct of the Iowa State Bar Association. If either party so informs this court, the matter shall be set for hearing before five or more justices of this court and the parties notified thereof by restricted certified mail at least ten days prior to the date set. At such hearing a certified copy of the testimony, transcripts, exhibits, affidavits and other matters introduced into evidence in such jurisdiction or federal court shall be admitted into evidence as well as any findings of fact, conclusions of law, decision and orders decided or issued. Any such findings of fact shall be con-

clusive and not subject to readjudication. Thereafter, the court shall enter such findings, conclusions and orders that it deems appropriate. If neither party so informs this court within thirty days from service of notice issued pursuant to the foregoing provisions hereof, this court may impose the identical discipline, unless this court finds that on the face of the record upon which the discipline is predicated it clearly appears: (1) The disciplinary procedure was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process; or (2) there was such infirmity of proof establishing misconduct as to give rise to the clear conviction that this court could not, conscientiously, accept as final the conclusion on that subject; or (3) the misconduct established warrants substantially different discipline in this state.

Where this court determines that any of the aforesaid factors exist, such order as is deemed appropriate may be entered by this court. Rule 117 shall apply to any subsequent reinstatement or reduction or stay of discipline.

118.18. Notification of clients and counsel. In every case in which a respondent is ordered to be disbarred or suspended, the respondent shall:

(a) Within fifteen days in the absence of co-counsel, notify his or her clients in all pending matters to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another lawyer;

(b) Within fifteen days deliver to all clients being represented in pending matters any papers or other property to which they are entitled or notify them and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(c) Within thirty days refund any part of any fees paid in advance that have not been earned;

(d) Within fifteen days notify opposing counsel in pending litigation or, in the absence of such counsel, the adverse parties, of the respondent's disbarment or suspension and consequent disqualification to act as a lawyer after the effective date of such discipline or transfer to disability inactive status;

(e) Within fifteen days file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties;

(f) Keep and maintain records of the steps taken to accomplish the foregoing; and

(g) Within thirty days file proof with this court and with the Committee on Professional Ethics and Conduct of complete performance of the foregoing, and this shall be a condition for application for readmission to practice.

118.19. Immunity. Complaints submitted to the grievance commission or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.

Members of the grievance commission, members of the committee on professional ethics and conduct, and their respective staffs shall be immune from suit for any conduct in the course of their official duties.

A true copy of any complaint against a member of the grievance commission or the committee on professional ethics and conduct involving alleged violations of the attorney's oath of office or of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or state of Iowa shall be promptly forwarded to the chief justice of this court.

118.20. Reports. The chairman of the grievance commission and the chairman of the committee on professional ethics and conduct shall, on July 1 of each year, submit to this court a report of the number of complaints received and processed dur-

ing the prior period, a synopsis of each such complaint, and the disposition thereof. In event such disposition was by way of dismissal of the complaint, the name of the attorney charged shall be omitted, but a synopsis of the charges made and by whom and a report of disposition shall be included.

Referred to in Ct.R. 118.9; R.P.P. 5*"d"*

118.21. Effective dates. These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

[Court Order June 10, 1964; October 8, 1970; November 8, 1974; January 15, 1975; November 21, 1977; January 15, 1979]

APPENDIX "C"

RULE 1. TERMS AND SESSIONS

Time. The court shall hold one general term annually beginning on the second Monday of September. Sessions shall be held at such times and places as the court directs.

RULE 2. ASSIGNMENT OF JUDGES: QUORUM

Noncontroversial Orders

(a) ASSIGNMENT OF JUDGES: QUORUM. The judges of this court shall, as provided in Title 28 U.S.C. § 46, be assigned to sit upon the court and its divisions as the court directs. Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered as provided by Rule 35 of the Federal Rules of Appellate Procedure and Rule 7 of these Rules. A majority of the number of judges authorized to constitute the court or a division thereof shall constitute a quorum. (As amended effective July 1, 1973.)

(b) ABSENCE OF QUORUM: ADJOURNMENT. If on the opening day or any other day of the term less than a quorum is present, any judge in attendance may adjourn the court until a later time, or, if no judge is present, the clerk may adjourn the court from day to day.

(c) PROCEDURAL ORDERS. A single judge of the court shall exercise the power to determine motions and petitions or to perform any power conferred on a single judge by Rule 27(c) of the Federal Rules of Appellate Procedure. This authorization shall include the power to (1) grant the right to appeal in forma pauperis, including the right to have the transcript prepared at government expense; (2) grant a certificate of probable cause; (3) grant appointment of counsel for an indigent defendant proceeding under Title 28, § 1915; (4) deny a motion to dismiss in accordance with local rule 9(b); (5) to order a stay in any

criminal or civil proceeding pending the determination of the stay by the court.

Any two judges of the court shall exercise the power to determine (1) the denial of the right to appeal in forma pauperis; (2) the denial of a certificate of probable cause; (3) grant of a stay pending appeal; (4) the denial of appointment of counsel in indigent cases; (5) to deny or grant bond pending appeal.

In all other matters three judges shall be convened.

(d) ORDERS GRANTABLE FOR THE COURT BY THE CLERK. The clerk of this court is authorized, in his discretion, and subject to review by the court, to take appropriate action in procedural matters, including the following:

(1) Consolidation of appeals;

(2) Substitution of parties;

(3) Motion to appear as amicus curiae;

(4) Motion to advance or continue cases;

(5) Applications to file briefs exceeding 50 pages;

(6) To allow amicus counsel to participate in oral argument by sharing time with other counsel;

(7) To enlarge the time for filing designations as to printing under Rule 30, F.R.A.P.;

(8) To transmit records to the Supreme Court for use in connection with petitions for writs of certiorari;

(9) To withdraw appearances in civil cases;

(10) To make corrections in briefs or pleadings, filed in this court at the request of counsel;

(11) To extend time for filing petitions for rehearing for not longer than ten days;

(12) To supplement or correct records;

(13) To incorporate records on former appeals;

(14) To authorize alternative method of designating contents of the appendix, under Rule 30(c), F.R.A.P.;

(15) To enter consent decrees in labor board and other government agency review cases;

(16) To appoint trial counsel on appeal in cases under the Criminal Justice Act.

If any of the above motions are opposed the clerk is authorized to submit the matter for ruling to a single judge of the court.

(e) RECONSIDERATION OF ORDERS. Any interested party adversely affected by an order entered by the clerk pursuant to subdivision (d) of this rule, shall be entitled to a reconsideration thereof by a quorum of the court or a judge of the court if, within ten days after service of notice of the entry of the order, such party shall file with clerk and serve upon the party who filed the motion or application for the order, a request in writing for the reconsideration, vacation or modification of the order, stating the grounds for such request. The clerk shall thereupon submit to a quorum of the court or to a judge of the court the order complained of, the motion or application upon which it was entered, the request for its reconsideration, and any suggestions which may have been filed in support of or in opposition to the request. The judges or judge shall reconsider the order and shall take such action with respect thereto as may be proper.

RULE 3. NO ORAL ARGUMENT OF MOTIONS

Motions shall be considered and decided by the court upon the motion papers and briefs. No oral argument will be allowed unless requested by the court.

RULE 4. CLERK

(a) LOCATION OF OFFICE. The clerk's office shall be in St. Louis, Missouri.

(b) DUTIES. The clerk shall perform the duties prescribed by Rule 45 of the Federal Rules of Appellate Procedure.

(c) CLERK TO FURNISH COPIES. The clerk, upon the filing of an opinion, shall mail a copy thereof to counsel for each of the parties who appeared in the case. For each additional copy of an opinion, a charge of $3.00 shall be made by the clerk. Annual subscriptions to all published opinions of the court are available at the rate of $200 per annum.

RULE 5. CALENDAR

(a) HEARING CALENDAR. A calendar shall be prepared by the clerk for each session of the court in accordance with the provisions of Rule 45(b) of the Federal Rules of Appellate Procedure. The clerk shall make every effort to prepare the calendar so that it is published no later than 20 days before the session. Counsel who anticipate a possible conflict are to notify the clerk prior to preparation of the calendar. After the preparation of the calendar any request to vacate a particular setting of a case shall be directed to the panel of Judges before whom the case has been calendared. Motions to vacate settings are not looked on with favor and will be granted only for good cause.

(b) ADVANCEMENT OF HEARINGS. The court may, on its own motion, or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the date set for hearing.

(c) POSTPONEMENT OF THE HEARING. After a case has been set for hearing, it may not be continued by stipulation of the parties, but only by an order of the court on good cause shown. Engagement of counsel in other courts will not be considered good cause.

(d) COMPANION CASES. Two or more cases involving the same question may by order of the court be heard together.

RULE 6. DOCKET CONTROL

(1) The chief judge may, from time to time in his discretion, appoint a panel or panels of judges of this court to screen pending cases for appropriate assignment or disposition under the rules of this court.

(2) A screening panel may classify a case as one requiring a full argument—30 minutes, an abbreviated argument—20 minutes, or as one requiring no argument.

(3) The clerk shall notify the parties of record when a case is classified as one in which no oral argument will be permitted. Any party so notified may request the court to re-classify the case as one requiring oral argument by filing a written request for reclassification within five days of the receipt of the notification.

(4) The clerk shall indicate on the calendar the time allocated for the argument of each case.

RULE 7. HEARING AND REHEARING EN BANC

A party or a judge of this court in regular active service may suggest that a case or controversy be heard or reheard en banc. A majority of the judges of this court in regular active service who are actively participating in the affairs of the court and are not disqualified in the particular case or controversy may order a hearing or rehearing en banc. The panel for the hearing or rehearing consists of the judges of this court in regular active service who are actively participating in the affairs of the court at the time of the hearing or rehearing and are not disqualified in the particular case or controversy and the senior circuit judges of this circuit who sat at the original hearing thereof unless the senior circuit judges elect not to sit at the rehearing en banc.

RULE 8. TRANSMISSION OF THE RECORD

Pursuant to Rule 11(e) of the Federal Rules of Appellate Procedure a certified copy of the docket entries in the proceeding below shall be transmitted to this court in lieu of the entire record, subject however to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. In all other respects the trasmission of the record shall be in accordance with the Federal Rules of Appellate Procedure.

RULE 9. SUMMARY DISPOSITION

(a) ON THE MOTION OF THE COURT. The court may at any time, on its own motion and without notice, dispose of an appeal summarily, except that notice must be given if the appeal is in forma pauperis, a certificate of probable cause has been issued, and briefs have not been filed. The court may dismiss an appeal that is not within the jurisdic-...

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